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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~601~~ 84

HERBERT BROWNELL, JR., Attorney General of The United States, as Successor to the Alien Property Custodian,
Petitioner

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under Indenture dated the 21st day of March 1928, Between Charles L. Cobb and The Chase National Bank of the City of New York, et al.

BRIEF FOR RESPONDENT, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK (now The Chase Manhattan Bank) as Trustee under Indenture dated the 21st day of March 1928, between Charles L. Cobb and The Chase National Bank of the City of New York, IN OPPOSITION

Opinion Below

The opinion of The Supreme Court of the State of New York, New York County (R. 338-39; New York Law Journal, May 28, 1954, p. 7) is not officially reported. That court's findings of fact and conclusions of law appear at (R. 150-168). Neither the Appellate Division, which affirmed the Supreme Court nor the Court of Appeals which denied a motion for leave to appeal, wrote an opinion.

Jurisdiction

The jurisdictional requisites as set forth in the petition do not support this application because the Court below decided this case on a non-federal basis.

Question Presented

Whether this court should review a judgment of the New York Supreme Court which was based upon a finding of *res judicata;* the said judgment having been decided on a strictly non-federal basis.

Statement

The facts to the extent stated are correctly stated by the petitioner. There are certain matters which have been omitted or were not fully treated to which we shall now refer.

In 1944 an action was brought on the Equity side of the New York Supreme Court by the Trustee of this trust for an accounting and for instructions. While that suit was pending the Alien Property Custodian by Vesting Order #4551 vested all the right, title and interest and claims in the trust, of all of the defendants named in that action. Thereafter the Alien Property Custodian intervened by petition in the said action. His petition was granted and an order was made by the New York Supreme Court, bringing him in as an intervening defendant. The Attorney General was thereafter substituted as an intervening defendant. He filed an answer asking the New York Court of Equity to construe the trust agreement and to grant him certain affirmative relief. This relief was not granted and a judgment was entered on January 30, 1948 (R. 155-158). The Attorney General appealed to the Appellate Division of the New York Supreme Court, and upon the affirmance of the judgment by the Appellate Division he appealed to the Court of Appeals of the State of New York. In the Court of Appeals the

Attorney General, referring in his brief to the broad powers given to the Attorney General under the Trading with the Enemy Act to seize property, demanded in the alternative that the Court of Appeals determine that the entire trust fund should be paid over to him. The Court of Appeals affirmed without opinion and no appeal or petition for a writ of certiorari was filed by the Attorney General from the judgment of affirmance of the Court of Appeals. (*Chase National Bank* v. *McGrath*, 301 N. Y. 602)

The Attorney General submitted himself to the jurisdiction of the Court of Equity of the State of New York by becoming an intervening defendant in the 1944 action.

Three years passed after the judgment of affirmance of the New York Court of Appeals and then the Attorney General "amended" his Vesting Order #4551. This "amendment" was made eleven days before President Eisenhower was to announce to Herr Adenauer that there would be no more seizures by the Attorney General. Instead of making use of a "turn over directive" which was the course followed by the Attorney General in the Zittman[1] case and in the Singer[2] case, he "amended" Vesting Order #4551 to make it, as he says a "*res* vesting order."

The Trustee was requested to account by the Attorney General. (R. 57-58) It began an action for an accounting in the same court that had passed upon the questions submitted in the previous action, at the same time asking for instructions as to the effect of the amended vesting order; and requesting that it be directed to retain a reserve for the prosecution of a suit against the Attorney General to recover the trust fund in case the Court should hold that the Attorney General was entitled to the trust fund. The Trustee felt that an immediate suit was necessary in such event in view of *Isenberg* v. *Trent Trust Co.* 26 Fed. 2d 609. The Attorney General appeared and answered the complaint requesting that the court determine that the fund should be paid over to him.

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[1] Zittman v McGrath, 341 U. S. 471

[2] Brownell v Singer, 347 U. S. 403

The New York Supreme Court as appears from the opinion (R. 338-339) found that it could not determine that the "Amended Vesting Order" gave the Attorney General the right to take over the trust fund because it was decided in 1948 that the Attorney General was not entitled to the income of the trust or to exercise any powers with respect to it; and that the ownership of the trust fund could not be determined until the termination of the trust. In *Chase National Bank* v. *Reinicke*, 76 N. Y. Supp. 2nd, 63 the Court had said at page 65:

> "At this time, remainder interests are essentially contingent and the identity of the ultimate remaindermen is unascertainable. The Attorney General's property rights are simply co-extensive with those of the beneficiaries whom he has succeeded. This precludes any power to change the terms of the original indenture and to confer on the Attorney General property rights superior to those of his predecessors in interest."

The Court at Special Term held that the Attorney General was not entitled to the trust fund, but he went on to decide that no beneficiary either was entitled to the trust fund until the trust terminated; and in the meantime the income should be accumulated, and that the Attorney General should have notice by registered mail of any proposed payment of income or principal by the Trustee.

Argument

The key point in this case is that the Attorney General submitted himself to the jurisdiction of the New York Court of Equity in the 1944 action which resulted in the 1948 judgment against him; and again in the second action he submitted himself to the New York Court of Equity by appearing and filing an answer and asking the court for certain relief; and the New York Court of Equity determined that the judgment rendered in the preceding action was *res judicata*.

In the preceding action, The New York Court of Equity had jurisdiction of the trust and any question affecting the trust. This jurisdiction once having attached to the trust, continued with respect to all matters pertaining to accounting and the disposition of the trust.

The Attorney General says that his submission to the New York Court of Equity has no significance and he points to two cases of very limited scope. We believe that the case which governs such submission is *Matter of Thekla* 266 U.S. 328 where Mr. Justice Holmes in holding that the District Court had jurisdiction to render judgment against the United States said at page 339:

> "When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

The Attorney General also says that the prior action with respect to this trust could not affect the right of the Attorney General to seize the principal of this trust. We think it did. First the court held that the Attorney General was not entitled to the income and that those entitled to the principal and income could not be determined until the trust terminated; and the Court of Appeals also rejected the eleventh hour demand made by the Attorney General in his brief to the effect that he was entitled to seize the trust fund pursuant to his powers under Section 5b (1) of the Trading with the Enemy Act (40 Stat. 415); demanding that:

> " *** the entire principal of the said trust should be transferred to the Attorney General as successor to the Alien Property Custodian on the ground that all interests in the trust had vested in the Attorney General by said Vesting Order #4551" (R. 155).

Finally the 1953 vesting order was not a new order. It was an amendment to an order which had been passed upon at the request of the Attorney General in the preceding action.

What the Attorney General is asking this court to do is to review a case which was decided on the basis of *res judicata*.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS A. RYAN

Counsel for Respondent, The Chase National Bank of the City of New York, now The Chase Manhattan Bank, as Trustee under indenture dated the 21st day of March 1928, between Charles L. Cobb and The Chase National Bank of the City of New York

January 1956

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